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Bay St. sees hope for P3s in LRT work

By Julius Melnitzer | Publication Date: Monday, 21 June 2010

Lawyers working in the public-private partnership arena are hopeful the federal government's announcement this month that it would contribute $600 million to transform Ottawa's transit system from buses to light rail may provide the catalyst for municipalities to hop on the controversial P3 bandwagon.

"For a number of reasons, the P3 model has not yet been widely embraced by the municipal sector, and it may be that projects of this nature will help turn the tide," says Heather Douglas of Borden Ladner Gervais LLP.


Heather Douglas

Federal Transport Minister John Baird said he expected Ottawa to use the money to advance a "practical and affordable" plan for the city. Although city council hasn't yet approved the project, Ottawa Mayor Larry O'Brien has stated that the current light-rail plan, estimated to cost $1.5 billion, will proceed.

"The project is going forward on the assumption that it will be a P3 project," says Morty Gross, also at BLG. "And if it does, it will show municipalities that they can do very large P3 projects successfully."

As it turns out, the LRT won't be Ottawa's first P3 project.

"The city has been a leader in the P3 industry," Douglas says. "They're currently involved in several projects, including Lansdowne Live, a $100-million redevelopment of Lansdowne stadium with retail, residential, and office components as well as an urban park."

P3 opportunities in the municipal sector also loom in the Toronto and Hamilton areas, where Metrolinx has developed a $50-billion, five-year integrated transportation plan that includes 15 priority rapid-transit projects. The province has already committed about $10 billion to the first five projects.

Dan Ferguson of Toronto's WeirFoulds LLP expects many municipalities across the country will be considering light-rail projects.

"LRT is a very cost-effective transportation alternative, especially when compared to the expense of constructing a subway," he says.

Still, the overwhelming evidence to date that municipalities are facing a major infrastructure deficit for things like roads, sewers, and water facilities hasn't motivated them to engage in P3 projects, which often arouse significant opposition, to a great extent.

According to the Canadian Council for Public-Private Partnerships, 31 per cent of Canada's civil infrastructure is more than 40 years old, and 28 per cent dates back more than 80 years. The older infrastructure gets, the costlier it is to repair and the more expensive managing it becomes.

The council also says the backlog in municipal-infrastructure work sits at $123 billion and cites a need for $115 billion in new facilities.

At the same time, a recent study of 35 Ontario municipalities found they spent only $255 million of the $700 million required for the 45 per cent of roads needing work. The situation is so bad that southern Ontario drivers are spending an average of almost $2,000 over the life of their cars to repair damage caused by poor road conditions.

Education isn't faring much better. The Ontario Public School Boards' Association estimates deferred maintenance costs are about $8 billion.

Facing these kinds of numbers, some believed municipalities would be among the first to hop on the P3 bandwagon, but they haven't.

"Some municipalities that have dipped their toes into P3-type arrangements in the past have been burned by the process," says Tim Murphy of McMillan LLP.

Murphy blames a lack of financial, legal, and technical expertise at the municipal level for the P3 experiments gone awry.

"Municipalities haven't had the staff, resources or institutional expertise to deal with the complexities of P3s," he says.

Municipal projects also tend to be smaller in scope than provincial or federal projects and, in many cases, investors perceive they lack the necessary efficiencies of scale.

"For example, the transaction costs involved in P3s aren't efficient unless you're dealing with projects of around $40 million," Murphy says.

Municipal accounting techniques and transparency obligations have also been issues.

“Municipalities’ practice of consolidating financing leases within their financial statements makes it more difficult to offload debt to the private sector,” says Gross. “And the fact that any project must ultimately be approved by council and therefore becomes public creates a subtle inhibitor for the private sector’s participation.”

Still, the time for municipal engagement in P3s seems opportune, lawyers believe.

A study by the Federation of Canadian Municipalities in January noted that 96 per cent of Canadians want the federal government to maintain or increase funding for local infrastructure in the next five years.

Another 69 per cent (second only to health care’s 75 per cent) regard the issue as the most important priority for continued spending even as the government deals with the deficit. At the same time, 83 per cent believe Canada’s prosperity is at risk if the government fails to upgrade facilities.

Finally, 37 per cent say aging infrastructure is, along with the federal deficit, one of the top threats to the national economy.

All of this, however, doesn’t necessarily make P3s a no-brainer for municipalities.

“There’s no question that infrastructure needs to be delivered, but that doesn’t answer the question as to how that infrastructure should be delivered,” says Bradley McLellan, also with WeirFoulds.

“Our advice to our municipal clients is that there should never be an automatic answer or a knee-jerk reaction to P3s, and the decision should always follow on an assessment of the individual circumstances and the business case for and against.”